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No. A-264

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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JANICE M. HAYES, *Petitioner,*

v.

VALLEY BANK OF NEVADA, A Nevada banking corporation; HERBERT STOUT, E. MORGAN WIXOM, E. PARRY THOMAS, JOHN WHELTON, Individually and as agents or officers of VALLEY BANK; WESTERN STATES BANKCARD ASSOCIATION, A California corporation; TYMSHARE TRANSACTION SERVICES, a California corporation; MASTER CHARGE: TRW, INC., an Ohio corporation d/b/a TRW CREDIT DATA, ada TRW INFORMATION SERVICES; STATE OF NEVADA: ELMER GUNDERSON, JOHN MOWBRAY, NOEL MANOUKIAN, CHARLES SPRINGER and THOMAS STEFFEN, individually and in their official capacities as Justices of the Supreme Court of Nevada, *Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

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No. A-264

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October Term, 1982

JANICE M. HAYES

Petitioner

vs.

VALLEY BANK OF NEVADA, A Nevada banking corporation; HERBERT STOUT, E. MORGAN WIXOM, E. PARRY THOMAS, JOHN WHELTON, Individually and as agents or officers of VALLEY BANK; WESTERN STATES BANKCARD ASSOCIATION, A California corporation; TYMSHARE TRANSACTION SERVICES, a California corporation; MASTER CHARGE: TRW, INC., an Ohio corporation d/b/a/ TRW CREDIT DATA, ada TRW INFORMATION SERVICES; STATE OF NEVADA: ELMER GUNDERSON, JOHN MOWBRAY, NOEL MANOUKIAN, CHARLES SPRINGER and THOMAS STEFFEN, individually and in their official capacities as Justices of the Supreme Court of Nevada.

Respondents.

REASONS FOR DENYING THE WRIT

The central question raised by the Petitioner in this case concerns the constitutionality of Nevada Rule of Appellate Procedure, Rule 46(b), prior to its 1981 amendment. Based upon a certified copy of the pertinent order of the Nevada Supreme Court dismissing an appeal by Petitioner in a related case before that Court, the Ninth Circuit Court of Appeals ruled that the Petitioner had no standing to challenge the constitutionality of NRAP 46(b)

because it was not applied to her. The Court below fully considered and correctly decided the issue.

The record below clearly indicates that Petitioner has alleged no injury either real or threatened, based upon an application of Rule 46(b) as to her, which would give her standing to maintain the action in the District Court. See e.g. O'Shea v. Littleton, 414 U.S. 488, 493 (1973), Valley Forge College v. Americans United, Etc., _____ U.S. _____, 102 S. Ct. 752 (1982). As the record stands, Petitioner, in short, is simply petitioning this Court for an advisory opinion. Both of the courts below properly declined to assume jurisdiction under these circumstances. See e.g. Flast v. Cohen, 392 U.S. 83, 95 (1968); Golden v. Zwicker, 394 U.S. 103, 108 (1969); United Public Workers v. Mitchell, 330 U.S. 75, 89 (1947); Muskrat v. United States, 219 U.S. 346, 362 (1911).

Although the trial court did not cite Petitioner's lack of standing as a basis for dismissing the action, it is clear that the Ninth Circuit Court of Appeals had the right and duty to affirm on that ground. For, "if the decision below is correct it must be affirmed, although the lower court relied upon the wrong ground or gave a wrong reason." Helvering v. Gowran, 302 U.S. 238, 245, (1937); Boncyk v. Cavanaugh Motors, 657 F.2d 1035, 1041 (9th Cir. 1981); Thomas P. Gonzales Corp. v. Consejo Nacional Etc., 614 F.2d 1247, 1256 (9th Cir. 1980); James V. Reese, 546 F.2d 325, 327 (9th Cir. 1976).

Petitioner complains that the Ninth Circuit Court of Appeals, by its recognition that Petitioner's appeal to the Nevada Supreme Court was not dismissed pursuant to NRAP 46(b),

"provided the appellees with a defense which they had not asserted." (Pet. p. 3, lines 3-4; p. 29, lines 5-7). Petitioner overlooks the fact that a "personal stake" at the time of commencement of the district court action is a jurisdictional requirement which may be raised at any time even by an appellate court on review. See e.g. Baker v. Carr, 369 U.S. 186, 204 (1962); Valley Forge College v. Americans United, Etc., supra, at 760; Mansfield, Coldwater & Lake Michigan Ry. Co. v. Swan, 111 U.S. 379, 382 (1884). The Nevada Rule of Appellate Procedure, Rule 46(b), having never been applied to Petitioner, it could not at the time of commencement of the District Court action been the basis of a case or controversy. The existence of a justiciable case or controversy, of course, is constitutionally required by Article III of the United States Constitution before the Federal District Court may assume jurisdiction. See e.g. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239-241 (1937).

Nothing in Petitioner's list of reasons why certiorari should be granted in this case overcomes the jurisdictional defects associated with her challenge to the constitutionality, operation, and effect of NRAP 46(b).

All of those reasons which Petitioner advances for granting of the writ assume that she has standing and that subject matter jurisdiction was extant throughout the lower court proceedings. The Ninth Circuit Court of Appeals properly recognized, however, that this is not the case.

The jurisdictional questions aside, the substantial court imposed policy considerations of repose underlying the doctrines of res judicata and collateral estoppel require that Petitioner's Petition be denied. The Peti-

tioner has previously appealed to this Court for review with respect to the same issue arising from the same state court proceeding which she complains of in the instant Petition. The prior appeal was dismissed by this court for want of a properly presented federal question. Hayes v. Valley Bank of Nevada, 446 U.S. 902 (1980), rehearing denied, 448 U.S. 908. For that reason alone, she should now be precluded on res judicata grounds from again raising this issue.

It follows from the reasons recited herein that the Petitioner cannot raise a substantial federal question regarding NRAP 46(b). Since no other substantial federal questions are posed in the subject Petition, or raised in the courts below, it is clear that the United States District Court below was without jurisdiction to entertain Petitioner's action, unless, perhaps, complete diversity of the parties was present. However, Petitioner conceded on page 1 and 5 of her Opening Brief in the court below, that such diversity was lacking in this case. Accordingly, the Federal District Court had no jurisdiction to entertain the Petitioner's Amended Complaint.

In summary the District Court was correct, even if for the wrong reasons, in dismissing Petitioner's Amended Complaint for want of jurisdiction. It follows that the Ninth Circuit Court of Appeals was correct in affirming the District Court, and that there is no reason for this court to grant certiorari to review the lower court decisions.

CONCLUSION

The petition for a writ of certiorari
should be denied.

Respectfully submitted,

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